IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.645 OF 2005
IN
ARBITRATION PETITION NO.78 OF 2005

Shree Ram Mills Limited,
Avadh Building, Ganpatrao Kadam
Marg, Lower Parel Division,
Mumbai 400 013. Appellant

versus

1. Kalpataru Construction Overseas
Pvt.Ltd; 111, Maker Chamber-IV,
Nariman Point, Mumbai 400 021.

2. Vijay nfrastructure Technolo-
gies Pvt. Ltd; 8, Vithalwadi,
Kalbadevi, Mumbai 400 002. Respondents

Mr.Vinod Bobde, Mr.Jimmy Pochkanwalla and Mr.Shyam Diwan - Sr.Counsel with Mr.P.A.Sawant and Mr.Sameer Garad i/by M/s.Khaitan & Jaykar for appellant.

Mr.I.Chagla, F.Divtre, Mr.D.Khambhata - Sr.Counsel with Mr.M.S.Doctor i/by M/s.Federal & Rashmikant for respondent no.1.

Ms.Pratibha Mehta i/by M/s.Little & Co. for respondent no.2.

CORAM : DR.S.RADHAKRISHNAN AND
S.C.DHARMADHIKARI, JJ.

DATE OF RESERVING THE JUDGEMENT : 06.10.2005

DATE OF PRONOUNCING THE JUDGEMENT : 27.10.2005

ORAL JUDGEMENT : (PER - S.C.DHARMADHIKARI, J.) :-

1. This appeal under section 37 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act") read with clause 15 of the Letters Patent challenges an order passed by a learned Single Judge in Arbitration Petition No.78 of 2005. By the order under challenge, the learned Single Judge has, on a petition filed by the first respondent herein, under section 9 of the Arbitration Act, passed the following order:-

> " ... ...
>
> ORDER
>
> (i) Interim order in terms of prayer clause a(ii) and a(iv).
>
> (ii) In case the Petitioners deposit an amount of Rs.13.30 crores in this Court and furnish a bank guarantee of a nationalised bank in the terms in which it is contemplated by the contract between the parties dated 28-6-2004 to the satisfaction of the Prothonotary & Sr. Master of this Court, within a period of eight weeks from today, interim order in terms of prayer clause a(i) shall stand granted.
>
> (iii) In that event, the Receiver shall take possession of the property and appoint the Petitioners to be his agent in possession of the property on usual terms and conditions, but without security and royalty. It is clarified that in that event the Petitioners shall be entitled to develop the property in accordance with law.

(iv) Petitioners shall be at liberty to apply for further reliefs, if necessary, either from the court or from the Arbitral Tribunal.

(v) In case the bank guarantee is furnished and the amount is deposited, the amount shall be invested in a fixed deposit in a nationalised bank during the pendency of the Arbitration proceedings. In relation to the bank guarantee, the Respondents shall be at liberty to make an application for further orders either before the Court or before the Arbitral Tribunal.

(vi) In case the Petitioners fail either to deposit the amount of Rs.13.30 crores as directed above or to furnish the bank guarantee within the period mentioned above, this order shall stand vacated and the petition shall be treated as dismissed. It is clarified that the amount shall be deposited and the bank guarantee shall be furnished by the Petitioners with due notice to the Respondents.

(vii) Petition disposed of."

2. Prayer clauses a(ii) and a(iv) of the Arbitration Petition claim an injunction against the appellant and the second respondent, restraining them from selling, alienating, transferring, parting with possession or creating any third party rights in any manner whatsoever in respect of the property which is more particularly described at Exhibit A-1 and Exhibit-T to the Arbitration Petition. The said prayer also seeks relief with regard to certain areas which are described at Exhibit A-2 of the

petition. The prayer clause a(iv) of the Arbitration Petition seeks an injunction in respect of a larger property, which is described in Exhibit-A. A reference would be made to these reliefs in some details in the latter part of this judgement.

3. For appreciating the appellant's challenge to the impugned order, a reference to few facts is necessary. Appellant is the original respondent no.1 to the above Arbitration Petition, whereas, first respondent is the original petitioner thereto. Original respondent no.2 is impleaded in this appeal as second respondent.

4. The parties shall be referred to as per the nomenclature in the Arbitration Petition.

5. Petitioner as well as first respondent are companies incorporated under Companies Act, 1956 and have their registered office at Mumbai. The petitioners are engaged in business of acquiring, constructing, developing, marketing and selling immovable properties.

6. Respondent no.1 is the owner of immovable properties in Mumbai. It is a part of "S.Kumar's

Group". It is owned and controlled by members of Kasliwal Family. It is contended that second respondent is also a group company.

7. Respondent no.1 is the owner and absolutely and well and sufficiently entitled to twelve adjoining pieces and parcels of land situate at Lower Parel in Mumbai, being partly freehold and partly perpetual leasehold, bearing C.S. Nos.288, 289, 1/1540, 2/1540, 3/1540, 1547, 1548, 1549 and 1550 of Lower Parel Division and also bearing C.S.Nos.309, 210 and 1/1539 of Lower Parel Division (corresponding Plot Nos.245 and 246 of Worli Estate Scheme No.52) totally admeasuring 67,785.50 sq. mtrs. or thereabouts with buildings and structures standing thereon. The said lands and buildings are hereinafter referred to as "the larger property". By an Agreement dated 28th June 2004 styled as a "Memorandum of Understanding" (for short "MOU") between the petitioners and the respondents, the respondent no.1, with the consent and concurrence of respondent no.2, inter alia, agreed to grant assign and convey to the petitioners lands admeasuring in aggregate 20,955.40 sq. mtrs. (out of the said larger property) situate at G.M.Bhonsale Marg, Mumbai (hereinafter referred

to as "the said property"). Under the said MOU, the petitioners were also granted the exclusive right to utilize the FSI of the said property on the basis of existing FSI ratio of 1:1:33 i.e. a total net FSI of 3,00,000 sq. ft. on the said property, as therein provided.

8. The total consideration for the said transfer was Rs.105.30 crores, being an amount of Rs.86.30 crores payable by the petitioners to the respondents under the MOU and an amount of Rs.19 crores agreed to be paid at the respondents' request to "Ajit Enterprises", a nominee of the respondents, which the petitioners believe is a partnership firm of the "S.Kumars Group" and of the Kasliwal family. Eventually, on 10th December 2004, an "Addendum to the MOU" was entered into at the request of the respondents, whereunder the amount payable under the MOU was agreed to be Rs.105.30 crores, payable to the respondents. The arrangement with "Ajit Enterprises" was accordingly cancelled. The said MOU dated 28th June 2004 and the said Addendum thereto dated 10th December 2004 are part of one and the same transaction and are one agreement and are hereinafter referred to as "the said Agreement". The petitioners annexed copies of

the MOU and the Addendum thereto as Exhibits-B and B-1 to the petition.

9. Acting under and in pursuance of the said MOU, the petitioners by their cheque dated 28th June 2004 bearing No.781766 drawn on ICICI Bank Limited, duly deposited with the respondents' advocates, a sum of Rs.5 crores, as recorded by the petitioners' advocates' letter dated 29th June 2004, wherein a request was also made for various documents. On or about 7th September 2004 the petitioners made payment of a further sum of Rs.5 crores to the respondents as provided in the said MOU, pending compliance by the respondents of various issues.

10. The further case of the petitioners is that at the request of the respondents, their Architect was deputed to assist and co-operate in the matter of obtaining approval for the revised lay-out and for sanction of plans etc.. There is a reference to the correspondence with regard to the approved revised lay-out, building plans and title of the first respondent to the larger property.

11. In the petition, there is a reference to the

meeting held on 10th November 2004 wherein several aspects with regard to the completion of transaction were discussed. The minutes of the meeting were prepared and signed by the respondents, and according to the petitioners, they are false and incorrect. There is a reference to the further meeting held on 28th November 2004 where again the matters were discussed. The petition then refers to the correspondence after this meeting. It is contended that the respondents did not comply with their obligations under the MOU during the time specified. It is contended that as per the Addendum the consideration was modified and it was to be Rs.105.30 crores instead of Rs.86.30 crores. It is contended that acting on the Addendum, further sums were paid and thus petitioners paid a sum of Rs.30.00 crores. it is then contended that necessary documents were to be exchanged, drafts of which were also forwarded.

12. We need not discuss these aspects in details because admittedly the matter is pending before the Arbitral Tribunal. It is contended by the petitioners that they forwarded drafts as also complied with other requisitions. They even

consented to mortgage of a large property. It is also contended that since there was no response from the respondents, a meeting was held on 6th January 2005 where again, without prejudice, proposals were placed for consideration. It is contended that at this meeting the respondents demanded a higher amount for the transaction to be completed. It is alleged that petitioners took all steps for completing the transfer and the transaction.

13. It is contended that one of the requirement was furnishing of draft of Deeds of Bank Guarantees in favour of the respondents to secure the payments of Rs.57.5 crores, as provided in the agreement. The respondents initially suggested alterations in the wordings of the said guarantees but the same were not acceptable to the petitioners' bankers. The correspondence with the bank is also referred to. Ultimately, it is contended that by a letter dated 14th January 2005 the petitioners' advocate addressed a letter to the respondents' advocate and recorded all facts and reconfirmed that the assignment in the clause of the bank guarantee was in order. The petitioners' advocate called upon the respondents' advocate to fix a meeting

to finalise the last draft of the Deed of Conveyance and Assignment. Instead of replying to this letter, at a meeting the representatives of parties on 17th January 2005, demand for increased amount was repeated by the respondents.

14. It is in this context that the petitioners contended in their petition that they are and have, at all material times, been ready and willing to provide said bank guarantees and to make the payment under the agreement. They have made all arrangements for the same and are and have at all material times been ready and willing to complete the transaction as per the agreed terms even though the respondents have failed to do so.

15. The petitioners have recorded in their advocates' letter dated 11th February 2005 the entire development and the conduct of the respondents in demanding higher sums. They have also recorded in this letter that the respondents have started entertaining offers from others with regard to the property and/or considering developing the same by themselves. In this letter the petitioners called upon the respondents to desist in doing so.

16. After referring to the terms and conditions incorporated in the documents and reciprocal obligations, it is contended by the petitioners that having paid a sum of Rs.30.00 crores and expressed readiness and willingness as aforesaid, it is clear that the petitioners are entitled to specific performance of the agreement which is valid, subsisting, in full force and effect and binding on the parties. It is contended that monetary sums would not be the compensation and relief for non performance of the agreement. Disputes and differences having thus arisen, the matters are being referred to Arbitration.

17. It is in these circumstances that in the petition, averments and prayers are made for interim measures from the Court for protection of the rights. The averments in this behalf are in paras 4(a), 4(b), 5(e) and 5(f). In para 6 of the petition it is contended that balance of convenience for grant of interim and ad-interim reliefs is in favour of petitioners and they have made out a strong prima facie case. If interim and ad-interim reliefs are not granted, grave and irreparable loss, injury and damage will be caused which could not be compensated in monetary

terms.

18. As noted above, it is this petition instituted on 14th February 2005 which was entertained by the learned Single Judge.

19. Upon being served with the papers, the first respondent namely appellants before us, filed their reply. It is their case that the complete arrangement between the parties is reflected not only in the MOU and Addendum but also in the gist of the meetings dated 10th November 2004 and 24th November 2004 and the correspondence referred to in the affidavit in reply. The bona fides of the petitioners were challenged inasmuch as it was contended that an attempt is made to revive the transaction and freeze the valuable property when the same is repudiated by the petitioners by not performing their obligations in time and/or committing breach thereof. Therefore, the petition is liable to be dismissed.

20. It is contended that the arrangement between the parties is that of development of an immovable property by a builder as a commercial venture for profit. The nature of the arrangement being such the petitioner is not

entitled to specific performance and damages would be adequate and complete relief. Without prejudice to the aforesaid, it was contended that as S.Kumar Group was in immediate need of about Rs.100.00 crores latest by October 2004 for financing its group companies particularly the Maheshwar Hydro Electric Project, the first respondent proposed to sell as aforesaid a part of the said property representing 20,955 sq. mtrs. (FSI of 3,00,000 sq. ft.), which is referred to as the Developable Land in the said MOU.. These funds were needed by October 2004 mainly in order to start the construction of Maheshwar Hydro Electric Project in the dry season. It was, therefore, made abundantly clear to the petitioner that any delay in receiving the consideration for the sale of suit property would result in the Maheshwar Hydro Electric Project being delayed beyond the critical dry season and may require even the Project to be abandoned exposing the first respondent to severe penalties and claims besides severe losses in excess of Rs.700 crores (Seven hundred crores). It was therefore, absolutely necessary for the first respondent to raise these funds from sale of the Developable Land latest by October 2004. If the respondent no.1 had to undertake development

themselves, it would take more than a year before the funds required by them could be raised. This was well known to the petitioners who all along assured the first respondents that they would ensure that the funds from the property transaction would be received by the first respondents well within the stipulated period of four months.

21. Reliance was placed by respondent no.1 on clause-5 of the Agreement which provided for furnishing of unconditional bank guarantees to the tune of Rs.57.50 crores. Reliance was also placed on clauses 14 and 15 thereof. It was then contended that the first respondent's principal obligation under the MOU was to obtain a duly sanctioned layout from the Bombay Municipal Corporation under Regulation 58 of the DCR, obtain approval of the Monitoring Committee under the provisions of Regulation 58 of the DCR, obtain ULC permission for residential user and obtain IOD for 3,00,000 sq. ft. FSI in addition to making out a clear and marketable title. Pursuant to the MOU, the first respondent have duly fulfilled all these obligations required to be complied with by them under clauses 2 and 3 of the MOU and have demonstrated their ability to

fulfil the obligations under clause 4 of the MOU which stage has till not arrived in view of the defaults of the petitioner in making payment and securing bank guarantees.

22. It was contended that the first respondent has fulfilled various requirements as enlisted by the petitioner and details whereof are furnished at Exhibit-VIII of the affidavit in reply. Respondent no.1 thereafter placed reliance upon several letters and other documents in support of their contention that complete compliance was made by them.

23. It was contended that the petitioner being unable to procure **Assignable Bank Guarantees** has raised frivolous issues strictly not related to the completion of transaction. They neither completed transaction nor made payment nor furnished the bank guarantees within the agreed period or the extended period, but itself repudiated the contract by non performance in time. The reasons for the petitioner not being entitled to any reliefs in the petition are set out in details in para 7 of the affidavit in reply. As far as the aspect of non furnishing of the bank guarantees, in the affidavit in reply

the contention raised is realizing the petitioner's inability to procure the assignable bank guarantees, the first respondent suggested another alternative to bank guarantee viz. of receiving monies directly from the petitioner in place of bank guarantee after deducting interest costs of first respondent in encashing the bank guarantee. However, the petitioner failed to respond to this. Even in the personal meeting of 20.12.2004, the first respondents requested the Chairman of the petitioner to arrange for the moneys directly. However, the Chairman of the petitioner clearly expressed his inability to arrange for the funds directly, or to get the required bank guarantees issued. It was under these circumstances that the four days grace period was agreed setting the date of 24.12.2004 for completion of the transaction. Even by that date the petitioner failed and neglected to perform its obligations. This was a clear repudiation by the petitioner.

24. On 06.01.2005 Mr.Bhansali of the petitioner met with the Directors of the first respondent wherein he once again reiterated the petitioner's inability to arrange for the assignable bank guarantees. It was therefore, clear by then that

the petitioner had repudiated the arrangement under the MOU.. In the said meeting, the first respondent accepted the repudiation and also discussed the issue of refund of Rs.30 crores received from the petitioner. Thus, the arrangement between the parties was put an end to. It was in these circumstances, that another meeting was arranged on 17.01.2005 between the directors of the first respondent and the directors of the petitioner wherein the petitioner used abusive language and instead of any substantive discussions regarding refund of Rs.30 crores, the meeting ended on a sour note.

25. In details, the issue, as to whether the petitioners were at all interested in completing the transaction and fulfilling their obligations under the agreement, is specifically raised in the affidavit in reply.

26. Since something turns on the ambit and scope of the powers of the Court under section 9 of the Arbitration and Conciliation Act, 1996, a reference to the averments in para 12 of the affidavit in reply becomes necessary. The same reads thus :-

> "12. Without prejudice to the aforesaid, I submit that in any case, the Petitioner is not entitled to any relief in respect of the property described in Exhibits-A and A-2 to the Petition. In this context, I say that the present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996. Under the said Section 9, reliefs can be granted only in respect of property which is the subject matter of the agreement, under which arbitration is invoked. In the present case, the property described in Exhibits A and A-2 to the petition, is not the subject matter of the said MOU or the said addendum, and, therefore, in the present petition, no relief can be granted in respect of the same."

27. The entire petition was thus dealt with. There are appropriate denials and assertions. First respondent has set out their independent pleas and has also placed reliance upon certain clauses in the agreement and correspondence to support the same. This detailed affidavit in reply together with several annexures came to be filed on 21st March 2005.

28. It appears that when the arbitration petition was placed before the learned Single Judge at initial stage, parties tendered minutes of order recording following :-

> " Without prejudice to all the rights and contentions of the parties and only in order to enable the First Respondent to

file an affidavit in reply, counsel appearing for the First Respondent states that for a period of two weeks from today:

1. The First Respondent shall maintain status quo in respect of Plot No.5A which is shown on the Relocation Plan annexed hereto, a copy of which is made available to the Petitioners and is also shown on the Plan Exhibit "T" to the Petition in blue bounded line. It is however, clarified that the demolition of the building "Avadh", partly situated on the said Plot No.5A shall continue, without prejudice to the rights and contentions of the parties.

2. The First Respondent shall also maintain status quo with regard to Plot No.3(MP), Plot No.4 (PG), Plot No.6 (RG) and Plot No.8 (MHADA) shown on the said Relocation Plan as well as Plot Nos.4A and 3A also shown on the Plan annexed hereto where the proposed relocation of "MP and PG" areas is to be done.

3. It is however clarified that the statement of status quo will not prevent the First Respondent from carrying out the relocation of Plot Nos.3 and 4 (MP and PG) respectively, in the event of the BMC permitting the relocation of the said Plot Nos.3 and 4 (MP and PG). In that event the First Respondent will hand over the said Plot Nos.3A and 4A respectively to MCGM in accordance with the DC Regulations.

4. It is further clarified that the First Respondent shall keep the areas required for the purpose of providing the accesses to Plot No.5A as shown in black colour on the Plan Exhibit "T" to the petition.

5. It is also further clarified that the statement of status quo with regard to Plot Nos.6(RG) and 8 (MHADA) will not prevent First Respondent from taking such steps as may be necessary to surrender the said Plots to BMC and MHADA as provided in MOU (Exhibit "B" to the petition).

> 6. Counsel states that the First Respondent has not till date created any third party rights nor alienated or transferred or encumbered with any of the aforesaid Plots and areas save and except as disclosed in the correspondence and documents furnished to the petitioners.
>
> 7. Counsel further states that agreement between the Respondent No.1 and Respondent No.2 dated 27th June 1996 pertaining to Plot No.5A has been cancelled pursuant to the deed of Cancellation dated 21st December, 2004 and the Respondent No.2 has no right, title, interest or claim of any nature whatsoever in the said Plot No.5A."

29. No doubt this arrangement was till the arbitration petition was heard and disposed of. So also it was without prejudice to the rights and contentions of both sides. It further appears that the arrangement was arrived at to enable the first respondent (appellant herein) to file their affidavit in reply.

30. After affidavits were filed by both sides, the petition was placed before the learned Single Judge for hearing and final disposal. By order under challenge, the learned Single Judge allowed the petition.

31. In allowing the request of the original petitioner, the learned Judge relied upon certain admitted facts. According to the learned Judge,

petitioner had paid an amount of Rs.30.00 crores to the respondents. Further, according to the learned Judge, by their letter dated 14th January 2005, petitioner through their Advocates informed the respondents that **they are in a position to furnish bank guarantee in terms of the contract between the parties.** Further, the learned Judge holds that there is no response to this letter. The learned Judge thereafter proceeds to reproduce clause-5 of the Addendum and concludes that Conveyance was not executed. The Addendum does not specify any time limit for conveyance. The agreement between the parties being sale of immovable property, they did not intend that time should be the essence of contract. The learned Judge held that there is no termination of this contract. The contract is subsisting. The claim before the Arbitrators being for specific performance and that the aforesaid letter expressing readiness and willingness on the part of petitioner to furnish bank guarantee and deposit further amounts, the petition needs to be granted. The learned Judge also relies upon the fact that readiness and willingness of the petitioner being demonstrated, a case is made out for appointment of Court Receiver not just for protecting the property but for permitting the

development and sale. At internal page 17 of the impugned order, the learned Judge concludes that a case for appointment of Receiver is made out with the aforesaid permission. The reasons are on the aforesaid lines.

32. We have set out the conclusions in a detailed manner only with a view to appreciate the rival contentions.

33. Mr.Bobde - learned Senior Counsel appearing for the appellant contends that the learned Judge fell in clear error in granting the reliefs prayed for in the arbitration petition. He submits that the impugned order is ex-facie erroneous and unsustainable. He submits that the learned Judge was aware of the fact that the petition invokes Section 9 of the Act. He submits that the powers of the Court under section 9 are mainly exercised to preserve and protect the subject matter of dispute before the Arbitral Tribunal. He submits that Section 9 read with the sub clauses and as a whole, makes it abundantly clear that the Court cannot grant substantive rights to parties and that too pending the reference before the Arbitral Tribunal. The powers ought to be exercised in a

manner so as not to render the reference infructuous. Beyond that, the provision does not empower the Court to confer any benefits and rights. Moreso, granting final reliefs.

34. Mr.Bobde submits that the Court has no power to finally decide the dispute and send the case to the Arbitral Tribunal as an empty formality so as to effectively oust the jurisdiction of the Arbitral Tribunal over the dispute. If orders like the impugned order can be passed as interim measures, two Acts of Parliament become dead letters : the Specific Relief Act, 1963 as well as the Arbitration and Conciliation Act, 1996. It would become futile for parties to go to the arbitral tribunal to have the dispute as to specific performance decided. It would also become unnecessary for the plaintiff to abide by the Specific Relief Act, 1963 and to -

a) prove his readiness and willingness, by evidence and relevant material, as mandated by Section 16(c),

b) prove that compensation in money is not an adequate relief for denial of specific performance under section 10(b),

c) bypass the bar to relief contained in section 14(1)(a) proviso (iii), and

d) satisfy the judicial conscience of the Court/Arbitral Tribunal that a case is made out for the exercise of the discretionary and equitable power to grant relief under section 20 of the Act of 1963.

35. Mr.Bobde further submits that the power to appoint a Receiver is a drastic power to be exercised in cases of urgency and for securing the ends of justice. The power is conditioned by Order XL, Rule 1, CPC in the sense that requirements of the provisions of the CPC have to be fulfilled and the judicially settled principles for appointment of Receiver are to be observed. Circumstances must exist to justify a finding by the Court that it would be just and convenient to appoint a receiver. A reasoned finding to this effect must be given by the Court upon considering the interests of justice, having regard to the relative merits of the case put forth by both parties. There must also be consideration of the balance of convenience and

it must be found to lie in favour of appointing a receiver. Moreover, the powers that can be conferred on the Receiver by the Court in Order XL, Rule 1, sub rule (1)(d) are, inter alia, for the realization management, protection, preservation and improvement of the property. The Court cannot confer power on the receiver, muchless upon his agent (the plaintiff) to proceed to develop the property by constructing his building on the defendant's land and irreversibly change it to the detriment of the defendant. The Court cannot grant the final relief through the appointment of a receiver. Essentially, the power is meant to preserve and protect and is exercisable where there is need for taking the urgent measure. No case has been established by the respondent, nor has the Court given any sufficient reasons, to justify the appointment of a Receiver at all, much less for the purpose of developing the property.

36. The submission of Mr.Bobde is that prima facie case in the present matter should be on the touchstone of Specific Relief Act, 1963. He invites our attention to the provisions of Specific Relief Act and contends that the said remedy cannot be availed of once there is a

personal bar to grant any relief.

37. On merits, Mr.Bobde contends that the relief of temporary injunction is a discretionary and equitable remedy under section 36 of the Specific Relief Act, 1963. Injunctions are not granted merely because a suit or claim is filed. In other words, freezing of proprietary rights is not to be done as a matter of course only because a matter is pending. As held in cases under Order XXXIV, Rule 1, apart from other equitable considerations like delay or not coming to the Court with clean hands, three basic requirements must be satisfied before a temporary injunction can be granted namely :-

a) the party seeking injunction has made out a prima facie case;

b) the said party would suffer irreparable injury if injunction is not granted;

c) the balance of convenience lies in favour of granting the injunction.

38. Mr.Bobde further submits that the respondent

was not ready with the bank guarantees all through and particularly on 11th February when it invoked arbitration clause and also on 14th February 2005, when they approached this Hon'ble Court under section 9 of the Arbitration Act.

39. Mr.Bobde further submits that the most fundamental term of the contract was the furnishing of assignable and immediately encashable bank guarantees to the appellant. On 2nd November 2004, the respondent's bank refused to give such guarantees. The appellant reiterated its urgent need for money and again requested for the guarantees on 17th December 2004 for Rs.57.50 crores and the further sum of Rs.13.30 crores and complete the transaction on 20th December 2004. The appellant finally requested on 22nd December 2004 that the transaction be completed by 23rd or 24th at the latest. Neither the respondent's reply of 18th December 2004 nor of 23rd December 2004 makes any mention whatever about the bank guarantees being ready. There is not even a request made by the respondent to the appellant for granting any time to furnish bank guarantees. The respondent claims to have written to its bank on 23rd December 2004 requesting for issuance of the

assignable guarantees. However, this was obviously not pursued with any sense of urgency. There is not a single reminder letter written by the respondent until 12th February 2005 i.e. one day after the arbitration notice of 11th February 2005. In fact, on 22nd December 2004, as the bank's General Manager's letter dated 15th February 2005 records that he had initially recommended "co-accepted bills facility" and that was being considered, not the issuance of assignable bank guarantees. The Bank Manager also says on 15th February 2005 that now the request is for bank guarantees. The word "now" suggests a point of time just before 15th February 2005, probably after the arbitration notice was issued on 11th February 2005. Hence on 24th December 2004 Mr.Parag Munot of the respondent enquired of Mr.V.K.Jain whether the appellant would accept co-accepted bills of exchange. It is, therefore, false to say that the bank was ever willing - until 16th February 2005 to issue the assignable bank guarantees which is after the filing of the petition on 14th February 2005.

40. Mr.Bobde further submits that the internal correspondence within the bank shows that giving

of guarantees was sanctioned internally by the bank only on 16th February 2005, two days after the petition was filed under section 9 on 14th February 2005 and five days after the respondent gave notice of arbitration on 11th February 2005. The actual bank guarantees have never been voluntarily given to the appellant before 14th February 2005 when the litigation commenced and even now have not seen the light of the day. The only indication that the bank became ready to issue the bank guarantees to the respondents is to be found in letter dated 20th April 2005 addressed to the respondent.

41. Mr.Bobde submits that there is, in this case, not merely an absence of a prima facie case, there is total absence of a case for specific performance. The law prohibits grant of specific performance in favour of the respondent. The claim for specific performance cannot succeed in law since the primary requirement of a prima facie case is wholly absent. No temporary injunction can be granted in respect of property, which was the subject of the contract, much less for the larger plot which was not even the subject of the contract.

42. Mr.Bobde submits that the learned single Judge has patently misread the letter dated 14th January 2005. Mr.Bobde further submits that the letter only says that the respondent confirms and accepts the clause suggested regarding the guarantees. It does not say that the guarantees have been issued by the bank or that the bank is even agreeable to issue them and that the respondent is ready with the guarantees. It also does not say anything about Rs.13.30 crores to be paid apart from the bank guarantees for Rs.57.50 crores. Significantly, it does not say that any part of the contract remained to be performed by the appellant. The plain position on record, on a bare perusal of the letter, is that the respondent never was ready with the guarantees for Rs.57.50 crores and was never ready and willing to pay Rs.13.30 crores.

43. Mr.Bobde submits that in this case time was clearly of the essence as is apparent from the language of the contract, the correspondence as well as the Minutes of Meeting dated 10th November 2004 and gist of discussions of 23rd November 2004. Moreover, the object of the contract, the nature of the property, and the surrounding circumstances and the conduct of the

parties, all point to the fact that time was indeed of the essence. Even if it was not of the essence originally it was made of the essence by letters dated 17th December 2004 and 22nd December 2004. It is settled law that notice to complete within a fixed time has this effect. The very fact that the contract concerns urban property, where the value of the land changes phenomenally in a short time, displaces the ordinary presumption.

44. Mr.Bobde submits that repudiation is to be inferred from the conduct and inaction of the respondent in the matter of fulfilling its essential obligations. The continued failure to obtain and furnish assignable bank guarantees and to pay the further sum of Rs.13.30 crores leads to the clear inference that the respondent had repudiated and put an end to the entire contract. The desire to perform the contract at some later time in the future - a time of its own choosing - coupled with a consistent failure to honor the fundamental term as to payments leads to the conclusion that the respondent did not want to proceed to complete the transaction as agreed. Thus, the respondent repudiated the contract. Even assuming that there was no repudiation and

the contract subsisted, it makes no difference to the applicability of the provisions of Specific Relief Act, 1963, and it is clear that in the teeth of Section 16(c) and section 10(b) read with section 14(1)(a), the respondent is disentitled to the equitable and discretionary relief of Specific Performance and for interim reliefs.

45. Mr.Bobde places reliance upon decisions of this Court and the Hon'ble Supreme Court in support of the above contentions. The details of the same are set out in the written submissions. The photocopies of the citations have been placed before us.

46. On the other hand, Mr.Chagla - learned Senior Counsel appearing for the original petitioners submits that this is a case where sanctity of a written contract is in issue. The jurisdiction is equity jurisdiction. The contract has to be honored. He submits that there is no repudiation of the contract and in fact the plea now raised is as an after thought. He submits that the said plea was given up before the learned Single Judge. He submits that contract is subsisting. Readiness and

willingness of the petitioners has been demonstrated. He submits that once the matter is placed on the pedestal of equity and discretion, then such pleas must be decided with reference to the same. He submits that equity demands that no conditions be imposed on the original petitioner. He submits that such conditions are imposed when there is no prima facie case.

47. In the instant case, according to Mr.Chagla, strong and overwhelming prima facie case is made out by the petitioner. The defence is totally dishonest. He submits that time is not the essence of the contract when it is a case of sale of immovable property. Mr.Chagla submits that the scope of section 9 is clear and the learned Judge has not travelled beyond the same. He submits that there are obligations under the MOU which are to be performed by the appellants herein. There are encumbrances on the property. Two agreements, one in favour of the second respondent and another in favour of Hanumesh Realities, had to be cancelled and their rights, if any, were to be terminated before the transaction with the appellants can materialise. There is an outstanding mortgage of bank and financial institutions. A marketable title has

to be made out by the appellants.

48. Inviting our attention to the correspondence on the question of bank guarantee, Mr.Chagla submits that there is no breach of the obligations in that behalf. He submits that a reading of the relevant clauses would make it abundantly clear that the bank guarantee was not to be kept ready and what is relevant is whether the petitioner was in a position to obtain and furnish the same. He submits that it is not disputed that the petitioner had made arrangements to procure and furnish the same. Hence, there is compliance with the requirements stipulated in that behalf.

49. He submits that reliance on a meeting and alleged discussions and agreements therein when no Lawyer was present, is misplaced, when appellants deny a meeting held in the presence of lawyers of the parties. He submits that the story of repudiation is ex-facie, bogus and false inasmuch as if the agreement is repudiated on 24th December 2004, then subsequent conduct and events do not prove even prima facie the same but demonstrates that the alleged repudiation has been given a go-bye. He submits that the letter

dated 14th January 2005 demonstrates the anxiety of the petitioner to complete the transaction. In these circumstances, petitioner was fully justified in seeking equitable reliefs. Whenever such reliefs are sought, then Courts of equity have ample powers in law to mould its orders and adjust equities. He submits that in the present case there are two reputed Advocates and Solicitor firms engaged by parties. They have enough experience in conveyancing. They addressed requisitions which have to be complied with by both sides. The obligations under the agreements have to be performed. Moreso, when there is no dispute about the same. He submits that the agreement is for sale of land and not mere a development agreement, as alleged. Relying upon clauses 1, 4, 5 and 13, he submits that there are mutual obligations and the transaction had to be worked out with co-operation and best efforts. It is not the intention to make time essence of the contract. This is amply demonstrated by clause 15 of the agreement. That contemplates 30 days notice. Admittedly, no notice has been given. There is no termination of the agreement and it is subsisting. There was no question of oral repudiation in such circumstances. He invites

our attention to the Addendum and contends that the agreement impacts larger area. It affects rights of petitioners under the agreement in question. There is first right of refusal. He submits that in such circumstances and considering the conduct of the appellant in fabricating the documents, such as Minutes of Meeting held on 10th November 2004, it is clear that a case was made out for grant of reliefs by the petitioner.

50. He submits that far from repudiating the contract, the parties proceeded ahead and in meetings even consultant in matters of ULC authorities was asked to expedite the matter. He submits that if there is a repudiation by the petitioner of the contract, then there was no occasion to send letter to the consultant. Thus, no injunction can be granted is a plea which is unavailable to the appellant. On the other hand, appellant must be held by the bargain and cannot be permitted to wriggle out of its obligations. He submits that it was, therefore, just and convenient that Court Receiver he appointed and this is what is precisely done by the learned Single Judge. There is no need to interfere with the said order.

51. As far as readiness and willingness of the petitioner is concerned, Mr.Chagla submits that the arguments of Mr.Bobde on this issue are misconceived and fallacious. He submits that the question of fact will have to be ultimately decided by the Arbitral Tribunal. However, it is erroneous to contend that when such issue is being considered, the party must keep the monies ready. He submits that there is no such requirement in law. Moreso, when the contract in question contains mutual obligations. Hence, there cannot be any obligation to deposit monies or furnish a bank guarantee unless the appellant fulfils it’s obligations. Even otherwise, inviting our attention to the letter of Oriental Bank, he submits that the petitioner had kept monies ready. Once the sanction letter is issued by the banker, then readiness and willingness is apparent. All that was required to be done was adding a stipulation in the model form in the bank guarantee. The form cannot be altered because that would be contrary to the Guidelines issued by Reserve Bank of India. The banker cannot flout the said guidelines. Therefore, appropriate clarifi- cations had to be obtained and the banker having clarified the matter and

expressed willingness on it's part, then the requirement of furnishing bank guarantees is complied with. Now, appropriate changes in the format have been made and he invites our attention to the documents in that behalf.

52. Mr.Chagla submits that in the above facts and circumstances, the learned Judge was right in placing reliance upon the letter dated 14th January 2005 and holding prima facie that petitioner was ready and is ready and willing even now to fulfil his part of the contract.

53. Mr.Chagla places reliance upon a decision of the Privy Council reported in AIR-1950-Privy Council Judgement-90.

54. Mr.Chagla then contends that time is not of essence in this case. Relying upon the judgement of the Constitution Bench of Supreme Court in Chandrani reported in AIR-1993-SC-1742 (paragraphs 18, 20 and 21), Mr.Chagla submits that the law is settled and time cannot be of essence when the contract is of sale of immovable property. He invites our attention to clause 15 of the agreement and contends that no notice contemplated by the terms of contract, has been

issued or any letter addressed in that behalf by the appellant.

55. Assuming without admitting that time can be of essence even then period between 17th December 2004 (after noon) till 20th December 2004 is not a reasonable period for complying with the obligations when the provision in the contract is of 30 days.

56. Before making time the essence of the contract, the appellant should have complied with all it’s obligations. There should not to be any default on the part of appellant. Primary obligations were required to be complied with by the appellant. For example, No Objection Certificate/Clearance from second respondent including of Hanumesh Realities. Mr.Chagla invites our attention to the letters on this issue and contends that there is no compliance by the appellant of the obligations under the contract as well as requisitions forwarded by the petitioner. Hence, assuming that time is essence of the contract, once the appellant is in default, then the petitioner must succeed at least prima facie. He invites our attention to para 3.24(g) of the petition and the affidavit in

reply containing denial on this aspect. Mr.Chagla submits that denial is patently false.

57. For all the aforesaid reasons, Mr.Chagla submits that there is strong prima facie case made out by the petitioner. Balance of convenience is also in favour of the petitioner. Instead of calling upon the petitioner to deposit any amount, to protect further injury and prejudice, interim order should be made in favour of the petitioner. He submits that this is a fit case where it is just and convenient to appoint Court Receiver with the powers as conferred by the learned Judge or in any event lesser power to take physical possession. Reason for this is that the agreement between the petitioner and the appellant is prior in point of time. There is a mortgage in favour of Infrastructure Leasing and Finance Services Limited (ICFS), which is subordinate to the rights of the petitioner. Once the agreement for sale over-rides the mortgage and the mortgagor has recognized this aspect, then this is a fit case for appointment of Court Receiver and affording proper protection.

58. It is pertinent to note that both, Mr.Bobde

and Mr.Chagla made alternate pleas. Mr.Bobde submits that without prejudice to the contentions raised by the appellant on setting aside the entire order of the learned Single Judge, if this Court feels that any protection is necessary or appropriate interim measures need to be adopted, then all that can be granted is temporary injunction to protect the rights of the petitioner only insofar as property covered by the agreement and rights flowing therefrom.

59. Mr.Chagla without prejudice to his contention that it is just and convenient to appoint Court Receiver, submits that in the event we are inclined to set aside the order of learned Single Judge in this behalf, then at least temporary injunction in terms granted by the learned Single Judge, be continued till the dispute is resolved by the Arbitral Tribunal.

60. With the assistance of Mr.Bobde and Mr.Chagla we have perused the arbitration petition, the annexures, the reply and rejoinders thereto. We have perused the relevant clauses of MOU as well as Addendum. Since reliance was placed before the learned Single Judge as well as before us on some letters and documents, we have

perused them for a limited purpose. In our view, considering the object and purpose of Section 9 of the Act, the limited issue that falls for our consideration, is whether the learned Single Judge was justified in passing the order reproduced above.

61. Our answer to the aforesaid issue is that the learned Single Judge was in error in appointing Court Receiver of the suit property and further permitting development thereon by petitioner as an agent of the Court Receiver. In our view, considering the facts and circumstances as well as ambit and scope of the powers conferred on the Court while appointing Receiver, the learned Judge should not have granted the prayer in this behalf. The order of learned Single Judge would have to be set aside to this extent. So also, the temporary injunction granted by the learned Single Judge will have to be confined and restricted as indicated by us hereinafter.

62. Our reasons for the aforesaid conclusions are set out hereinbelow.

63. At the outset, we wish to make it clear that

all that is observed by the learned Single Judge as well as by us in the present order, is restricted and limited for the purposes of the petition filed under section 9 of the Act and shall not in any manner be construed as a final expression on the merits of the controversy. The Arbitral Tribunal shall proceed in the matter uninfluenced by the observations as they are prima facie in nature.

64. Section 9 of the Act reads thus :-

> "9. Interim measures etc. by court - A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36, apply to a court -
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely -
>
> (a) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration agreement;
>
> (b) securing the amount in dispute in the arbitration;
>
> (c) the detention, preservation or inspection of any property or thing which is the subject matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for

> any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purposes of obtaining full information or evidence;
>
> (d) interim injunction or the appointment of a receiver;
>
> (e) such other interim measure of protection as may appear to the court to be just and convenient,
>
> and the court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

65. In the case of Firm Ashok Traders Vs. Gurumukhdas reported in 2004(3)-SCC-155, the Supreme Court observed thus :-

> "15. The most basic principle governing the discretion of the court in appointing a receiver is whether it is "just and convenient" to do so."
>
> "17. ... ... The purpose of enacting Section 9, read in the light of the Model Law and UNCITRAL Rules is to provide "interim measures of protection". The order passed by the court should fall within the meaning of the expression "an interim measure of protection" as distinguished from an all time or permanent protection."

Applying the above mentioned principle as also the settled tests in considering an application

for interlocutory reliefs, to the facts and circumstances of the present case, it will not be possible to uphold the contentions of Mr.Chagla insofar as prayer for appointment of Court Receiver is concerned. We see much substance in the contentions of Mr.Bobde on this aspect. He has rightly contended that the learned Single Judge exceeded the mandate of this provision. However, Mr.Bobde's other submissions cover much wider feild and it is not necessary to consider them. Once this conclusion is reached, then naturally the further authority granted to the Court Receiver does not survive.

66. We fail to appreciate the necessity of passing such a drastic order at this stage. The impugned order does not indicate as to why the arrangement arrived at by parties cannot continue pending the decision of the Arbitral Tribunal. The composition of the Arbitral Tribunal surely cannot be a ground to pass an order of Receiver and injunction as well. That too, with sweeping powers. In this behalf, it is pertinent to note that in the arbitration petition, the petitioner prayed that Court Receiver be appointed as Receiver of the property described in Exhibit A-1 and bounded in Blue Colour on the plan annexed as

Exhibit-T and all the areas on the remaining part of the larger property delineated in Orange, Pink, Green and Black Colours on the plan (Exhibit-T) and description in Exhibit A-2. A perusal of the said exhibits to the arbitration petition would make it clear that as far as Exhibit A-1 is concerned, it is the description of the said property. The petitioner describes the said property distinctly from the larger property. The said property is admeasuring in aggregating 20,955.40 sq.mtrs. situate at G.M.Bhosale Marg, Mumbai. Exhibit A-2 admittedly is description of the areas reserved by Municipal Corpn. of Greater Bombay and MHADA under Regulation 58 of the Development Control Rules. Exhibit-A is the description of the larger property.

67. It is pertinent to note that in the MOU the larger property is described in Clause-1. It is admittedly admeasuring 68,537.01 sq.mtrs. or thereabout together with several buildings and structures standing thereon. It is described elaborately in First Schedule to the MOU. However, it is clear from reading of Clause-II of the MOU that what is granted to the petitioner is consumption of total net Floor Space Index (FSI)

of 3,00,000 sq. fts. excluding areas deductable under Regulation No.35(2)(c) of Development Control Regulations, 1991 by utilising correspondingly land area admeasuring 20,955.40 sq. mtrs.. It is also clear from a perusal of this clause that an area of 19,055.40 sq.mtrs. is freehold land and area admeasuring 1,900 sq. mtrs. is Municipal Perpetual Leasehold Land. It has been determined on the basis of FSI ratio of 1:33. The portion, thus, carved out for development is described more particularly in second schedule to the MOU and is bounded in Blue Colour on the plan annexed to the MOU..

68. The MOU records that on the terms and conditions stipulated therein parties have agreed and consented to grant, assign or convey to the petitioner (developer therein), the developable land with the exclusive right and authority to develop and utilise at it’s own costs, charges and expenses in all respects, the aforesaid total net FSI initially for a consideration of Rs.86.30 crores and subsequently enhanced at Rs.105.30 crores. The owner’s obligations along with second respondent are set out in clause-2. Parties also agreed vide clause-4 that simultaneously with the payment, as provided in

clause 5(iv) and two guarantees provided in proviso to clause 5(v) and (vi), the owner shall comply and second respondent herein shall cause the owner to comply with the matters enlisted therein. Clause-5 dealing with payment insofar as relevant for our purpose, is reproduced hereinbelow :-

> "(v) Rs.28.75 Crores to be paid within 7 1/2 months from the date of payment made (iv) above; and
>
> (vi) Rs.28.75 Crores to be paid within 7 1/2 months from payment of (v) above.
>
> Provided, however, that the Developer shall furnish unconditional and irrevocable guarantees by the Developer's Bank/s /Financial Institution/s acceptable to the Owner/VIT, guaranteeing the payments under sub-paras 5(v) and (vi) above on their respective due dates and these guarantees shall be such that the same should enable the Owner/VIT and/or its/their assignees to encash them immediately after they are issued."

69. A bare perusal of the same would indicate that the bank guarantees would be such so as to enable the appellant and second respondent as well as their assignees to encash them immediately after they are issued. The obligation of the developer is to furnish such unconditional and irrevocable guarantees. They have to be in terms of the draft guarantees

acceptable to the appellant and the second respondent. They must guarantee payments under the abovementioned sub-clauses of clause 5 on their respective due dates and their nature should be as aforestated.

70. The real issue, therefore, was that apart from making payment of Rs.30.00 crores and complying with other aspects noted by the learned Single Judge, the petitioner had also fulfilled the obligation with regard to the bank guarantees. In this behalf, before proceeding further, it is pertinent to note that in the arbitration petition the petitioner contended thus :-

> "3.21 The Petitioners have taken all necessary steps for completing the transfer of the said property and to complete the transaction. The Petitioners have furnished to the Respondents the draft of the Deeds of Bank Guarantees in favour of the Respondents to secure the payment of Rs.57.5 Crores as provided in the agreement. The Respondents initially suggested alterations in the wordings of the said Guarantees, some of which were not acceptable to Petitioners' Bank as set out in the Bank's letter dated 2nd November, 2004 (copy annexed as Exhibit "P" hereto) which was forwarded to the Respondents. Subsequently, on or about 22nd December, 2004, the Respondents' Mr.V.K.Jain (Group financial Controller) informed the Petitioners that the Bank Guarantee format should contain an

"assignment clause" as per the specimen faxed to the Petitioners i.e. that the guarantee could be assigned subject to the regulations, if any, stipulated by the Reserve Bank of India. Mr.Parag Munot of the Petitioners confirmed to the said Mr.V.K.Jain on 24th December, 2004 that the said "assignment clause" was acceptable to the Petitioners.

3.22 By their letter dated 14th January, 2005 to the Respondents' Advocates, the Petitioners' Advocates' inter alia, recorded these facts and reconfirmed that the said "assignment clause" in the bank guarantees was in order. By the said letter, the Petitioners called upon the Respondents Advocates to fix a meeting to finalise the last draft of the Deed of Conveyance and Assignment. Hereto annexed as "Exhibit "O" is a copy of the said letter dated 14th January 2005. There has been no reply to the said letter. However, there was one more meeting between the Petitioners' and Respondents' representatives on or about 17th January 2005 when the Responents repeated their demand for an increase in the amount payable. The Petitioners are and have at all material times been ready and willing to provide the said Bank Guarantees as required and to make payment of the amounts as required under the said agreement. The Petitioners made all arrangements for the same, and are and have at all material times been ready and willing to complete the said transaction as per the agreed terms, even though the Respondents had and have not fully complied with their obligations under the said agreement."

71. Perusal of these averments would demonstrate that the petitioner has raised pleas which are some what inconsistent and contradictory. If the assertion is that they have taken all steps for transfer of the property and the transaction,

then there was no necessity of urging further that draft of the deeds of bank guarantees in favour of the appellant to secure payment of Rs.57.5 crores were forwarded. This plea proceeds on the basis that forwarding drafts was the only obligation on the part of the petitioner. Further, if that be the position and appellant suggested alterations to the wordings of the guarantee which according to the petitioner necessitated approaching their bankers, then we fail to understand as to why reference should be made to confirmation of the **"assignment clause"** and it's acceptability as far as petitioner. The parties have understood their respective obligations. Moreso, from a reading of the averments it is clear that the petitioners were aware that the bank guarantees have to be assignable and immediately encashable. That they are aware of such a fact, is clear from reading paragraph 3.21 reproduced above. However, a reading of paragraph 3.22 makes it clear that what the petitioner records in its letter dated 14th January 2005 addressed to the respondents' advocate, is reconfirmation that the assignment clause in the bank guarantee was in order.

72. If the letter of 14th January 2005 is strong

prima facie proof of readiness and willingness on the part of the petitioner, then there was no need to raise pleas as reproduced above. The petitioner has averred that they are and they have at all material times been ready and willing to provide bank guarantees as required and to make payments of the amounts under the agreement. However, in the very next sentence it is contended that the petitioners have made all arrangements for the same and are have at all material times been ready and willing to complete the transaction as per the agreed terms even though the respondents have failed to carry out their obligations. This was totally unnecessary and uncalled for pleading. That, this is the interpretation of the letter dated 14th January 2005 is thus clear to the petitioners themselves.

73. With the assistance of learned senior counsel appearing for both sides, we have perused this letter. In paragraph 4 of the said letter, far from the assertions reproduced above, all that is stated is that petitioners' confirm and accept the clause suggested by the appellants vide their fax dated 22nd December 2004 addressed to the petitioner's representative Mr.Narendra Lodha. It is nothing but an acceptance of the

term of the bank guarantee purportedly suggested by the appellants herein. It is then contended in paragraph 4 of this letter that draft of this guarantee was otherwise approved and accepted by the appellants in all other respects.

74. The learned Single Judge, in our view, was in clear error in concluding that the averments reproduced above as well as contents of this letter demonstrates that the petitioner is ready and willing and was at all material times ready and willing to comply with the obligations under the MOU and the Addendum thereto. This conclusion could not have drawn by the learned Single Judge on a bare reading of the petition as well as letter in question.

75. We hasten to add that it is not necessary for us to conclusively decide as to whether the assertions in the petition as well as letter demonstrates readiness and willingness on the part of the petitioner, as that aspect is subject matter of inquiry and adjudication by the Arbitral Tribunal. Today, the proceedings before it have yet to commence. We have no doubt that on a fuller and complete opportunity being given to both sides, the Arbitral Tribunal will decide

this issue conclusively. However, for the purposes of appointing a Court Receiver, as prayed by the petitioner, the averments in the arbitration petition and letter dated 14th January 2005 are of little assistance.

76. All contentions based on the said letter and more particularly the averments in the arbitration petition have been dealt with and denied by the appellants before us. Even assuming that there is no reply to the letter dated 14th January 2005, yet, by itself it is of no assistance in holding prima facie that the petitioner is and was at all material times ready and willing to fulfil it’s obligations.

77. The admitted position emerging from the record and noted by the learned Single Judge thus cannot be the basis for considering and granting the relief of appointment of Court Receiver.

78. A perusal of paragraph 10 of the impugned order demonstrates that the learned Judge was aware that the contract contemplated bank guarantee of a particular nature. Moreso, the same should be capable of being encashed immediately. However, despite noticing this

aspect, the learned Judge in para 12 proceeds on the basis that the agreement being not terminated and being subsisting and letter dated 14th January 2005 demonstrating readiness and willingness, the prayer for appointment of Receiver could be considered.

79. The learned Judge has referred to settled principles of law pertaining to time being of essence in such contracts. Further, the learned Judge has noted that the Addendum was entered into in which, according to him, no time limit is fixed for transfer of the property. Thus, according to him, the compliance with regard to execution of the conveyance/transfer deed, will have to be within a reasonable time and it depends from case to case.

80. The learned Judge holds that the respondents have unilaterally fixed the dates for execution of the transfer deed. But by that time they had not complied with all the requirements necessary for executing the deed of transfer. He holds that the contract had not been terminated by the respondents (appellants before us) for non furnishing of the bank guarantee. Since the contract is not terminated and petitioner has

offered monies and bank guarantee within 30 days from 24th December 2004, then there is substance in the contention of the petitioner that appellants are trying to wriggle out of their obligations under the contract because they want higher price.

81. Once the clauses in the agreement together with the averments in the arbitration petition are taken into consideration, then it is not possible to sustain such observations and findings. Moreso, when materials produced at this stage do not conclusively establish that petitioner has fulfilled it’s obligations. It is risky to conclude that there is readiness and willingness on the part of the petitioner and the appellant had failed to honor it’s commitment. That aspect will have to be gone into in greater details before the Arbitral Tribunal.

82. We have referred to the averments in the petition as also reproduced the clauses with a view to test the correctness of the aforesaid prima facie finding and conclusion. Since, we are of the view that the facts and circumstances relied upon at this stage do not show that all the obligations of the petitioner under the

agreement have been complied with, then it is not just and convenient to appoint a Receiver of the property. Once this conclusion is reached, then that part of the order where the learned Judge has proceeded to appoint the Receiver and confer upon him powers to develop the property of the petitioner, needs to be interfered with. The order and direction in that behalf is patently unsustainable being vitiated by obvious error as aforesaid.

83. However, we are of the view that since the Arbitral Tribunal is yet to go into the claim of the petitioner and consider the pleas raised for claiming specific performance of the agreement in question, it will be fit and proper and in interest of justice that the subject matter of the dispute namely portion of the property available for development by the petitioner is not alienated, encumbered, transferred or parted with possession by the appellants herein. It is necessary to protect rights of petitioner considering the fact that a sum of Rs.30.00 crores has been paid and the claim is yet to be adjudicated. Since an opportunity will have to be granted to both sides to prove the rival contentions, the subject matter of the claim must

be protected. In that regard, prima facie case is made out by the petitioner. Balance of convenience is also in its favour as substantial amount has been parted with. If petitioner ultimately succeeds, grave loss, irreparable harm and injury will be caused. Therefore, injunction in these terms needs to be granted in the facts and circumstances of present case. We have carefully considered the submissions of Mr.Bobde on this aspect. However, whether the petitioner will be entitled to specific performance of the agreement, cannot be decided finally at this stage. His submissions on the nature of the right conferred, readiness and willingness of the petitioner and fulfilment of obligations have to be considered by the Tribunal after all materials are placed before it. At this stage, straightaway no conclusions can be drawn. Therefore, injunction in the terms set out hereinafter would meet ends of justice. The prayer for injunction cannot be refused merely because the appellants have expressed their willingness to refund the amounts paid to them.

84. In the light of what is observed above, it is not necessary for us to go into the aspects such as time being essence of the contract,

alleged repudiation thereof by the petitioner and whether the petitioner would be entitled to specific performance of the same or not. In our view, submissions of Mr.Bobde on the last aspect noted above, are really for the Arbitral Tribunal to go into and decide finally. Neither it will be fair nor proper to say anything on this aspect one way or the other. We have set out rival contentions in some what details only to emphasise the fact that arguable questions are raised. At this stage it is not necessary for the petitioner to prove his case on merits. Once it is demonstrated that there is a contract for sale of immovable property for a consideration of Rs.105.30 crores and a sum of Rs.30.00 crores has already been parted with and further the petitioner asserts that despite fulfilling all obligations the transaction is not completed, then, till the Arbitral Tribunal goes into the matter in elaborate details, it will not be proper to permit and allow the appellant to alienate the property. The claim of the petitioner for specific performance cannot be rendered infructuous. At the same time, the injunction as granted by the learned Single Judge being too wide, the relief in that behalf needs to be moulded and modified. Today, as has been

rightly objected to by Mr.Bobde, the injunction is in such terms that the appellant's rights in the larger property are also affected. The nature of rights conferred by the MOU and the Addendum being noticed above, the injunction order ought to be in consonance therewith. Ultimately, it is that agreement/contract which is sought to be specifically enforced. The obligations thereunder are required to be performed. Therefore, anything which is not falling within the purview of the same, cannot be covered by the order of injunction.

85. We are of the view that the order passed at the first hearing of the arbitration petition and reproduced by us above, with some modifications, can continue and is thus substituted in place of the order of injunction granted by learned Single Judge.

86. In the view that we have taken, it is not necessary to consider all the decisions brought to our notice. These decisions have been rendered after hearing of the suit and in some cases appeals by the concerned High Courts. It is at that stage that the question and issues raised therein fell for consideration of the

Hon’ble Supreme Court.

87. Save and except Constitution Bench decision, which according to Mr.Bobde has been considered in subsequent decisions by Hon’ble Supreme Court, we need not advert to any of the decisions. The Constitution Bench decision too in para 24 observes thus :-

> "24. From an analysis of the above case law it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract the Court may infer that it is to be performed in a reasonable time if the conditions are :
>
> 1. from the express terms of the contract;
>
> 2. from the nature of the property; and
>
> 3. from the surrounding circumstances, for example : the object of making the contract."

88. The principles laid down, therefore, have to be applied to the facts and circumstances of each case. It will be unfair if we say anything more as the matter is pending before the Arbitral Tribunal.

89. We have considered the rival contentions only for the limited purposes namely decision on

a petition u/s 9 of the Act. The rival contentions on merits of the controversy are kept open for being agitated before the Arbitral Tribunal.

90. In the result, the appeal succeeds. The order passed by learned Single Judge appointing Court Receiver is set aside. All further directions in that regard also stand set aside.

91. As far as order of injunction granted by learned Single Judge in terms of prayer in the petition is concerned, the same stands substituted by the following order :-

A) Pending hearing and final disposal of the claim before the Arbitral Tribunal :-

I) The appellant (original respondent no.1) shall maintain status-quo in respect of Plot No.5A which is shown on the relocation plan annexed hereto, a copy of which is made available to the respondents and is also shown on the Plan Exhibit ‘T’ to the petition in blue bounded line. It is, however, clarified that the demolition of the building

‘Avadh’, partly situated on the said Plot No.5A shall continue, without prejudice to the rights and contentions of parties.

II) The appellant (original respondent no.1) shall also maintain status-quo with regard to Plot No.3(MP), Plot No.4 (PG), Plot No.6(RG) and Plot No.8(MHADA) shown on the said relocation plan as well as Plot Nos.4A and 3A also shown on the plan annexed hereto where the proposed relocation of ‘MP and PG’ areas is to be done.

III) It is, however, clarified that the statement of status-quo will not prevent the appellant (original respondent no.1) from carrying out the relocation of Plot Nos.3 and 4 (MP and PG) respectively, in the event of the BMC permitting the relocation of the said Plot Nos.3 and 4 (MP and PG). In that event the appellant (original respondent no.1) will hand over the said Plot Nos.3A and 4A respectively to MCGM in accordance with the DC Regulations.

IV) It is further clarified that the appellant (original respondent no.1) shall keep the areas required for the purpose of providing the accesses to Plot No.5A as shown in black colour on the plan Exhibit-T to the petition.

V) It is also further clarified that the statement of status-quo with regard to Plot Nos.6(RG) and 8(MHADA) will not prevent the appellant (original respondent no.1) from taking such steps as may be necessary to surrender the said Plots to BMC and MHADA as provided in MOU (Exhibit-B to the petition).

VI) The appellant (original respondent no.1) shall not create any third party rights nor alienate or transfer or encumber with any of the aforesaid plots and areas save and except as disclosed in the correspondence and documents furnished to the respondents.

92. This was the arrangement arrived at during the hearing of the Arbitration Petition and this Appeal. We are of the view that no prejudice

will be caused if the same is continued further.

(DR.S.RADHAKRISHNAN, J.)

(S.C.DHARMADHIKARI, J.)